The Meaning of Free Speech

(*For Pacifists*)

by

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THE FREE SPEECH LEAGUE
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On August First, 1917, there was held in Madison Square Garden, New York City, a Free Press Meeting to protest against the recent arbitrary suppression of eighteen radical and pacifist periodicals. At that meeting I sought to promote a unity of all interested groups on a common standard of free speech. This was so much in line with the platform of the PEOPLE'S COUNCIL OF AMERICA that I am requested by it to prepare my statement for wider circulation and for more permanent service. I herewith submit my compliance with that request. *T. S.*

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MEANING OF FREE SPEECH

(*For Pacifists*)

I view printing as but an extended form of speech and so use the terms free speech as including freedom in all modes of transmitting ideas.

Next let me say that I am not a good pacifist, I am not for peace at any price, but I believe in free speech even for the pacifists. To deny people the right to hear pacifists is to deny their right to pass judgment on the issues of peace and war.

I hope that Prussianism will not be justified by German success. I wish the race had developed sufficient interest in further democratization so that Kaiserism could be defeated at its own violent game and in all its forms, by a resistance, democratically begun and democratically conducted. Perhaps when that is possible it will also have become unnecessary. I want the Kaiser beaten by and for a growing democracy, not

by and for the impairment of such democracy as we have achieved. More democracy depends as much upon the attainment and preservation of free speech as upon the destruction of Kaiserism.

These are but different essential avenues to the goal of further democratization. Therefore we should be as eager to fight for free speech as for the destruction of Kaiserism.

Lust For Power.

So long as the people are indifferent, and our judges and our public officials harbor Kaiserism in themselves, we will not have free speech, neither will we have much of the substance of democracy. Under such circumstances constitutional guarantees like German treaties, become mere "scraps of paper." The lust for power is strong in all of us. We must be on our guard against the Kaiser's temperament in ourselves and in our "democratic" officials, as well as to be on guard against Kaiserism across the Ocean. When one openly claims a divine right to rule, that claim, sooner or later will effectively be chal-

lenged. More subtle and therefore more dangerous to democracy are those who, without claiming a divine right, yet act under the cloak of democracy as though they had both divine right and divine omniscience. All censors unconsciously approximate this attitude.

Kaiser Believes In It

I have never met any one that disapproved of the words free speech. The infamous High Commission Court and the equally infamous Star Chamber Courts, as well as William Blackstone that arch high priest of all tory lawyers, all these agree in believing in free speeeh "*properly understood.*" Probably the Kaiser would have professed to believe in free speech but not free license, even at the very moment when he encouraged the Austrian Emperor to insist upon abridging free speech in Serbia.

In the diplomatic correspondence between Austria and Serbia, which ended in the declaration of war, the final issue resolved itself mainly into an issue over the unwillingness of the Servian government to abridge the

constitutionally guaranteed free speech of its own subjects. Austria demanded that Serbia suppress Servian patriots at home who were denouncing Austro-Hungary. Serbia refused and the war resulted. (1).

Importance of Definition

The whole free speech controversy therefore resolves itself into one about the meaning of "free speech." Most people believe in free speech for all who agree with them, and for a few who mildly and politely disagree, and for others who disagree only as to "non-essentials." Some radical agitators use "free speech" as merely another name for their ism, and show this by their indifference when those of other beliefs have their freedom of expression abridged.

When these groups are not interfered with they imagine free speech exists for all, or that its abridgment

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(1). See chapter: Free Speech and the War; in Free Speech for Radicals, enlarged edition, p. 191, where the diplomatic correspondence is analyzed and quoted from N. Y. Times of Aug. 9th, 1914. My essay was first published in, The New Review, March, 1915.

as to others is none of their concern. It would be better if such persons acquired a general principle of free speech, under which they will defend the liberty of their enemies as well as of their friends. Many need to learn the facts about the solidarity of liberty, and the importance of evil tyrannous precedents.

Unfortunately few will defend the right of others to intense disagreement. Most people have no ideas which need defending or which they consider important enough to contend for. Accordingly such persons think that unabridged free speech has generally and always existed in these United States. Such blind faith promotes the development of censorship. The precedents as to constitutional construction which may be established under the pressure of war conditions may plague us for centuries.

For these and other reasons, it becomes important that we unite on a standard of Free Speech.

The Blackstone Evil.

What then should free speech mean to us? Some American courts have adopted the definition of Blackstone

and of the British tyrants whom he defended. A more intelligent and more democratic view will lead to the uncanonizing of Blackstone and the following of his opponents. For centuries before our revolution the opponents of the divine right of priests and of kings and of their judges were denouncing the limits of free speech as enforced by the English courts and approved by Blackstone. It was the opinion as to free speech, that was advocated by these republicans and dissenters which was meant to be written into our constitutions, not the free speech of the rulers by "divine-right" as formulated by Blackstone. Undemocratic judges think and act otherwise.

Friends of Freedom

For centuries before our revolution the friends of free speech contended for a very definite idea. In America their view of free speech finally triumphed over that of Blackstone, and over that of the judges by divine-right. It was that view, the very opposite to Blackstone's, that was finally written into our constitutions.

It is that view of free speech that I am now contending for. That which tyrants seriously disapprove in others, they always say has a "dangerous tendency." Contrary desire is the only standard that has ever been devised for judging the existence of an evil psychologic tendency. That idea which is dangerous to the claim of prerogatives and for special privileges, or dangerous to a claim of superiority, by discrediting their relative omniscience in matters vital to their economic interests or to their vanity, such an idea is always denounced as of "dangerous tendency." Then upon the pretense of such a constructive danger they proceed to apply censorship, and the punishment of ideas as such. No other excuse ever was offered or ever will be accepted for any form of censorship.

The friends of free speech denied the sufficiency of this justification for censorship. Since there was no other excuse they also denied the jurisdiction of the state to deal with any mental offense, upon the basis of a mere speculation about the problematic psychologic tendency of

a disapproved idea. Only actual and material injuries to person or property could be rightfully punished. Mere words, they insisted, should always remain free, that is, they should be conceded to be beyond the jurisdiction of the state. (2).

American Libertarians

This conception of free speech was brought to America by Roger Williams. Through his effort and that of his followers, including Madison and Jefferson, this conception triumphed over the puritan theocracy and was incorporated into our organic law.

This is the conception of frec speech for which stood the Continental Congress. These patriots said we needed liberty of the press to shame and intimidate public officials into more honorable modes of conduct. (3).

This was the conception of free speech held by Jefferson, when in the

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(2). See chapter: "Overt act and actual injury versus evil psychologic tendency" in my: Constitutional Free Speech defined and defended. (Now in preparation).

(3). Journal of the Continental Congress, vol. 1, p. 108, Edition 1904.

Virginian Act of Toleration he had it said: "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession and propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty, because he being of course, judge of that tendency will make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." (4).

United States Supreme Court

This is the interpretation of the constitutional guarantees that the American people endorsed when they elected Jefferson to the Presidency on the issue of his opposition to the Alien and Sedition law. Even the United States Supreme Court has once given its approval to the above

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(4). Free Press Anthology. p. 95.

views of Jefferson as being authoritative on the meaning of our constitutional liberty. (5). This is the only conception of free speech that is to be derived from a critical study of the words of our constitutional guarantees, (6) or from the antecedent historical issue over the evils to be remedied, (7) or from the synthetic method of constitutional interpretation. (8). This is the only conception of free speech that is consistent with the democratic rights of the people to hear and to know all that is to be known, of the conditions upon which it is their conceded right and accepted duty to pass a democratic judgment, for the determination of the policies of their gov-

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(5). Reynolds vs. U. S. 98 U. S. 162.

(6). Concerning the meaning of freedom of the Press; Central Law Journal, March 26, 1909; Revised in Chap 6, Free Speech for Radicals.

(7). Obscene Literature and Constitutional Law, Chap. II; Republished from: Central Law Journal, Mch. 18-25, 1910. For more thorough work see: Constitutional Free Speech defined and defended; (in preparation).

(8). See: Methods of Constitutional Construction; Also for same: Free Speech for Radicals, enlarged edition, Chap. 8.

ernment. To limit intellectual liberty is so far to deny and destroy democracy.

Formulae for Free Speech

Before closing, let us state the above concept of free speech in brief dogmatic formulae. This can be done in terms of the (*a*) mental, (*b*) jurisdictional, (*c*) verbal or (*d*) constitutional aspects. Let us express the same idea from each of these viewpoints.

(*a*). No person shall be disadvantaged by the state for a mere psychologic offence, even though based upon a problematical speculation about the prospective realization of a disapproved, imaginary psychologic tendency, upon some future hypothetical hearer or reader.

(*b*). The state has no rightful jurisdiction to punish any one except for an actual and material injury, or an overt act capable of inflicting such injury and judged so according to the known laws of the physical universe.

(*c*). No one shall be disadvantaged by the state for a mere use of words or other method of expressing ideas,

so long as these are dissociated from actually ascertained resultant injury, and from materially injurious overt act.

(*d*). The constitutional right of free speech is operative only so far as the state successfully protects each and all of its inhabitants against privately inflicted injury, as well as official interference, for all expression or transmission of mere ideas, that is so long as unconnected with pre-designed and resultant actual and material injury, or pre-designed resultant overt acts which, according to the known laws of the physical universe, are judged capable of inflicting such actual and material injury.

When public officials observe their oath to uphold the constitutional guarantees of free speech, and enough persons will vigorously uphold such public officials, then no one will be prevented from receiving, even the most odious opinion—about the most obnoxious subject—expressed in the most offensive manner—by the most despised person. Then will speech be free and democracy hold sway.